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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JEROME J. PALUMBO
and
ROBERT T. PORTER. . . . . PETITIONERS,

vs.

UNITED STATES OF AMERICA. . . . RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

DID THE DISTRICT COURT ERR IN PERMITTING THE PROSECUTION TO IMPEACH SEVEN (7) OF ITS OWN WITNESSES, WITHOUT A PROPER LIMITING INSTRUCTION, WITH EVIDENCE OF THEIR CONVICTIONS FOR CRIMES IDENTICAL OR SIMILAR TO THOSE WHICH PETITIONERS WERE CHARGED?

DID THE DISTRICT COURT ERR IN PERMITTING THE PROSECUTION TO INTRODUCE A SUMMARY-CHART EVIDENCING ALLEGED OTHER CRIMES OR BAD ACTS OF THE PETITIONERS IN VIOLATION OF RULES 403 AND 404(b), FEDERAL RULES OF EVIDENCE?

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LIST OF PARTIES

The following is a list of all parties involved in this proceeding and their respective counsel:

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IN THE
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UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The Judgment and Decision of the United States Court of Appeals for the Sixth Circuit is unpublished. A copy thereof may be found in Appendix "A".

The Judgment and Decision of the United States Court of Appeals for the Sixth Circuit denying Petitioners' request for a rehearing is unpublished. A copy thereof may be found in Appendix "B".

JURISDICTION

The unpublished Judgment and Decision of the Sixth Circuit Court of Appeals was rendered and filed on September 9, 1987. The Order of the United States Court of Appeals for the Sixth Circuit denying Petitioners' motion for a rehearing was entered on October 29, 1987.

This Petition for Writ of Certiorari was filed within sixty (60) days of the denial of Petitioners' motion for rehearing. Jurisdiction is properly invoked pursuant to Title 28, United States Code, Section 1254.

FEDERAL RULES OF EVIDENCE INVOLVED

Rule 403, Federal Rules of Evidence, Exclusion on Grounds of Prejudice, Confusion or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of

undue delay, waste of time or needless presentation of cumulative evidence.

> **Rule 404(b), Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes**
>
> (b)Other crimes, wrongs or acts---Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

The Petitioners were convicted by a jury in the United States District Court for the Western District of Kentucky at Ashland of conspiracy to defraud a bank, in violation of Title 18, United States Code, Section 371; of aiding and abetting in making false entries on forms and statements of a bank insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code,

Sections 1005 and 1014; and of misapplying bank funds, in violation of Title 18, United States Code, Section 656.

The indictment upon which the Petitioners were found guilty alleged a conspiracy to obtain approximately $300,000.00 from the Sparta Sanders State Bank, Gallatin County, Kentucky, through the procurement of false and/or fraudulent loans made to family members and business associates of the Petitioners. Of the six (6) persons indicted in this action, only the two (2) Petitioners stood trial.

The UNITED STATES OF AMERICA, in its case in chief, called over thirty (30) witnesses, seven (7) of which were impeached with evidence of prior convictions for substantially similar crimes. Five (5) of these witnesses had been convicted of crimes totally unrelated yet identical in nature to the case at bar. The prosecution "impeached" each of these witnesses in a nearly identical

manner by asking "[name of witness], are you the same [name] that was convicted in the United States District Court for the Southern District of Ohio on January 21, 1986, for the felony offense of a conspiracy violation of federal laws?" (see Appendix "C").

The Petitioners objected to this repeated use innuendo evidence, yet such objections were overruled. The prejudice engendered by the introduction of this guilt by association evidence was not remedied by the trial court's incomplete limiting instruction. The district court failed to properly caution the jury that such evidence cannot be used as substantive evidence of the Petitioner's guilt. The instruction given by the trial court related only to the effect such a conviction may have on a witness' credibility.

Near the conclusion of the government's case in chief the prosecution called a summary witness, pursuant to Rule 1006, Federal

Rules of Evidence. This witness testified regarding some $2.5 million in outstanding loans to a company referred to "Classic Cars". These loans, the witness testified, were made solely for JEROME J. PALUMBO's benefit. Yet, not a single loan agreement was shown to contain MR. PALUMBO's name or signature.

In actual fact, these "Classic Car" loans were in no way connected nor related to the crimes charged in the indictment. Defense counsel's objections to this prejudicial "other crimes or bad acts evidence" was overruled.

The government's case consisted of demonstrating the paper trail of the loan proceeds to the jury as they were reinvested in bank stock and of demonstrating that almost every person connected with Petitioners had entered a guilty plea on charges which were substantially similar, if not identical, to that which these Petitioners were charged.

Petitioners PALUMBO and PORTER were found guilty and sentenced to twelve (12) year and five (5) year sentences, respectively.

The Petitioners appealed their verdicts to the Sixth Circuit Court of Appeals, which affirmed their convictions over Petitioners' arguments that they were improperly convicted by the prosecution's inference of their guilt by association with other convicted witnesses and that the introduction of the unsubstantiated "Classic Car" loans evidence violated Rule 404(b), Federal Rules of Evidence. The Sixth Circuit Court of Appeals noted that the Petitioners' objection to such evidence was based on Petitioners' assertions that "these [loans] were not PALUMBO's (Judgment and Decision, p. 8).

A petition for rehearing was filed and denied, and this Petition for Writ of Certiorari was filed within sixty (60) days thereof.

REASONS FOR GRANTING PETITIONERS' WRIT OF CERTIORARI

This Writ of Certiorari should be granted to decide two (2) important questions of federal law which should be settled by the United States Supreme Court. In addition, a decision of this Court is needed to decide a conflict that exists in the various Circuit Courts of the United States regarding the proper method and burden of proof in using Rule 404(b), other crimes evidence.

These Petitioners' convictions were obtained because the prosecution was permitted to improperly introduce evidence tending to establish the Petitioners' guilt by their association with other parties who had been convicted on similar but unrelated charges.

Defendant PORTER's wife (JUDITH PORTER), sister (ONEY), secretary (LYKINS) and a close business associate (PICKETT) all were each asked if they were "convicted in the Southern District of Ohio on January 21, 1986, for the

felony offense of a conspiracy violation of federal laws" (see Appendix "C"). They answered affirmatively. In addition, two (2) Co-Defendants (TAYLOR and LABANZ) testified as to their guilty pleas on the exact indictment upon which the Petitioners stood accused. It is readily apparent that the jury, when confronted by the evidence that almost every person who was in any way connected with Petitioner PORTER or his business had plea guilty to a substantially similar offense, drew the necessary inference that these Petitioners were also guilty through their association with these convicted felons.

This Petition for Writ of Certiorari is presented to permit the United States Supreme Court the opportunity to fully address and settle the difficult question of when a co-defenant's prior guilty plea may be admitted in a co-defendant's trial.

As far back as Uphaus v. Wyman, 360 U.S. 72, 79, 79 S.Ct. 1040, 1046 (1959), rehearing denied 361 U.S. 856, 80 S.Ct. 40 (1959), this Court has held that "guilt by association remains a thoroughly discredited doctrine". See, also, United States v. Louis, 814 F.2d 852 (2nd Cir. 1987) (co-defendants' guilty plea may not be considered as substantive evidence of defendant's guilt); United States v. Patterson, 780 F.2d 883 (10th Cir. 1986) (same).

A case directly on point with the case at bar is United States v. Fleetwood, 528 F.2d 528 (5th Cir. 1978). That court found the trial court had committed reversible error in permitting the prosecution to demonstrate that similarly situated co-defendants had pled guilty when faced with the exact identical circumstances as the defendant on trial.

The Fleetwood court indicated such evidence should be reviewed under a totality of

circumstances approach. Some of the factors the Fifth Circuit found relevant were whether there existed a proper purpose in introducing the guilty plea, whether such plea was "improperly emphasized" or whether a proper limiting instruction was given.

Counsel submits that the prosecution's repetitious use of the particular method of impeachment "unduly emphasized" the witnesses' guilty pleas and, when coupled with the incomplete limiting instruction of the trial court, unfairly prejudiced the Petitioners.

Several Circuits realize that a cautionary instruction limiting the use of a co-defendant or witness' guilty plea is critical. United States v. Baiz, 703 F.2d 453 (10th Cir. 1983); see, also, Bisaccia v. Attorney General of State of New Jersey, 623 F.2d 307 (3rd Cir. 1980) (use of guilty plea without proper limiting instruction may violate due process).

The Eighth Circuit Court of Appeals, in United States v. Roth, 736 F.2d 1222 (8th Cir. 1984), held that a jury should be given an instruction as to what purposes such evidence may be used, "and that they are not to infer the guilt of the defendant". See, also, Wallace v. Lockhart, 701 F.2d 719 (8th Cir. 1983).

The trial court did not provide the proper cautionary instruction to the jury. The United States Supreme Court should make a final determination as to the proper scope of a limiting instruction regarding the admission of a co-defendant's guilty plea and under what circumstances and with what precautions such evidence should be admitted.

The prosecution's introduction of alleged other crimes evidence of Petitioner PALUMBO was error. At trial, the government's expert testified, through a summary chart, that PALUMBO had diverted or otherwise embezzled $2.5 million through fraudulent

loans to his personal use. No documents were entered into evidence and no other witnesses testified to these "bad acts" or other crimes of PALUMBO. He had never been charged, indicted or convicted of these actions, yet the prosecutor "proved" these other crimes to the jury as surely as if he had. Before a court can reach a determination as to the probativeness of extrensic evidence, it must first determine that there exists some basis in fact for that extrensic evidence. In essence, this other crimes evidence was used without any showing that it was a crime for which Petitioner PALUMBO was responsible.

The government believed that only a minimal burden of proof suffices to permit the introduction of such other crimes evidence. However, there is great confusion within the Circuits relating to the burden of proof of such evidence.

The Seventh Circuit Court of Appeals, in United States v. Marks, 816 F.2d 1207 (7th

Cir. 1987), follows the "clear and convincing evidence" standard. Therefore, if "the other crimes are relevant to those he is charged with, are established by clear and convincing evidence that is not unduly prejudicial and are not just being used to show that the Defendant has a propensity to commit crimes, evidence of their commission is admissible in the district judge's discretion", id., at 1209 (emphasis added).

The Fourth Circuit, as held in United States v. Melia, 691 F.2d 672 (4th Cir. 1982), cert. denied 471 U.S. 1135, 105 S.Ct. 2674 (1985), abides by the "necessary and reliable" standard. The Melia court cites to several Fourth Circuit cases that have adhered to the "necessary and reliable" standard. See, e.g., United States v. Davis, 657 F.2d 637, 639 (4th Cir. 1981); United States v. DiZenzo, 500 F.2d 263, 265, 266 (4th Cir. 1974).

The Tenth Circuit follows a third approach. That Circuit has developed a three (3) prong test for the admissiblity of such other crimes evidence. "The evidence (1) must tend to establish intent, knowledge, motive. . .; (2) must also be so related to the charged offense that it serves to establish intent, knowledge. . .; and (3) must have real probative value not just possible worth. Additionally, the uncharged crime or act must also be close in time to the crime charged." United States v. Kendall, 766 F.2d 1426 (10th Cir. 1985), cert. denied --- U.S. ---, 106 S.Ct. 848 (1986). Without proof that Petitioner PALUMBO committed the alleged other crimes acts, there is absolutely no permissible probative value that may be derived from this evidence.

In United States v. Biswell, 700 F.2d 1310 (10th Cir. 1983), that Court indicated that such other crimes evidence must be "clearly established", i.d., at 1318.

The Sixth Circuit has one of the most relaxed standards for permitting the introduction of unproven other crimes or bad act evidence. In United States v. Ebbens, 800 F.2d 1422 (6th Cir. 1986), the standard that was ennunciated was whether "the proof shows by a preponderance of the evidence that the defendant did in fact commit the act", i.d., at 1432 (emphasis added). The Sixth Circuit's approach was adopted from the Second Circuit's United States v. Leonard, 524 F.2d 1076, 1090-1091 (2nd Cir. 1975), cert. denied 425 U.S. 958, 96 S.Ct. 1737, 48 L.Ed.2d 202 (1976).

However, even within the Sixth Circuit there existed at one time multiple standards. In United States v. Huddleston, 802 F.2d 874 (6th Cir. 1984), vacated 811 F.2d 974 (6th Cir. 1987) (appeal pending), the court held that before other crimes evidence may be admitted there must be "clear and convincing proof". The Huddleston court cited cases

from the Fifth, Eighth and Ninth Circuits as support for this contention. However, following the grant of the prosecution's petition for rehearing, the Sixth Circuit panel that heard the original Huddleston appeal acceeded to the Ebens "preponderance of the evidence" standard, vacating their previous judgment as well as "the clear and convincing evidence" requirement for the Sixth Circuit. The Huddleston court also noted the existence of this "conflict among the Circuits", i.d., at 976.

The Fifth Circuit, in United States v. LeMaire, 712 F.2d 944 (5th Cir. 1983), cert. denied 964 U.S. 1012, 104 S.Ct. 535 (1983), specifically noted that the "clear and convincing proof standard was abandoned. . .", i.d., at 947. The standard utilized in Lamaire was whether "there is sufficient evidence for a jury to conclude that the defendant committed the extrensic acts [citing United States v. Beecher, 582 F.2d 898 (5th

Cir. 1978) cert. denied 440 U.S. 920, 99 S.Ct. 1244 (en banc) (emphasis added)].

The Eighth Circuit, however, still requires "clear and convincing evidence". In United States v. Krapp, 815 F.2d 1183 (8th Cir. 1987), that Circuit's three (3) prong test was stated:

> (1) The evidence [must be] relevant to an issue in question other than the defendant's character; (2) there is clear and convincing evidence that the defendant committed the other acts; and (3) the potential unfair prejudice of the evidence does not substantially outweigh its probative value [citing United States v. Pierce, 792 F.2d 740, 743 (8th Cir. 1986)].

The Eleventh Circuit has chosen to follow the test devised by the Fifth Circuit. In United States v. Nahoom, 791 F.2d 841 (11th Cir. 1986), the court decided to adhere to the Beechum test, holding that "the court should allow . . . the evidence unless 'the jury could not reasonably find the prelminary

fact to exist'", Nahoom, at 845, quoting Beechum, at 913 (emphasis added). The court specifically held that clear and convincing evidence was not mandatory.

Because there exists several contradictory or inconsistent standards regarding the burden of proof of other crimes evidence within the several federal Circuit Courts of Appeals, this issue is particularly well suited for a final and settling determination by the United States Supreme Court.

CONCLUSION

The United States Supreme Court should grant this Petition for Writ of Certiorari to make a determinative resolution of these two (2) important questions of law.

Respectfully submitted,

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(f/D-115)

APPENDIX "A"

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

NO. 86-5745
NO. 86-5746

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
ROBERT T. PORTER (86-5745),	)
JEROME J. PALUMBO (86-5746),	)
	)
Defendants-Appellants.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BEFORE: KENNEDY, MILBURN and NORRIS, Circuit Judges.

PER CURIAM. Defendants-appellants Robert T. Porter and Jerome J. Palumbo appeal their convictions of conspiracy to defraud the Federal Deposit Insurance Corporation ("FDIC") in violation of 18 U.S.C. [Sec.] 371, making false entries on the books of a bank in violation of 18 U.S.C. [Sec.] 1005, and making false statements for the purpose of obtaining bank loans in violation of 18 U.S.C. [Sec.] 1014. Defendant Porter also appeals from his conviction of misapplication of bank funds in violation of 18 U.S.C. [Sec.] 656. The principal arguments on appeal are that: (1) the district court erred by permitting the prosecution to elicit testimony from seven of its witnesses concerning their prior convictions and guilty pleas for the purpose of exposing defendants to the impermissible inference of guilt by association, and (2) the district court erred by permitting the prosecution to introduce evidence concerning the "Classic Car loans",

which, according to defendants, was a "blatant attempt by the prosecution to show other crime evidence in order to establish bad character and propensity to commit crimes." For the reasons that follow, we affirm.

I.

The charges against defendants stem from their activities at the Sparta Sanders State Bank, a small bank located in Gallatin County, Kentucky. The evidence showed that in 1981 the Sparta Sanders Bank was operating under a cease and desist order which had been issued because of the unsound financial conditions existing at the bank. The bank was ordered to increase its capital by approximately $315,000.00 before May 9, 1982, or else the bank's insurance would be rescinded. During this time, defendant Porter was vice-president and a major shareholder of the bank.

The evidence further showed that in order to meet the deadline and raise the needed capital, defendant Porter enlisted the assistance of defendant Palumbo and others. Rather than attempting to raise the money through legitimate sources, defendants decided to obtain the funds from the bank itself by making a series of loans to family members and friends of defendant who, in turn, gave the money back to defendants. The evidence showed that the loans were either obtained without collateral or were undercollateralized. As a result of his involvement, defendant Palumbo became a major shareholder of the bank.

The prosecution called as witnesses each of the fourteen people who had either obtained loans for defendants or assisted them in laundering the funds. The government impeached the credibility of five of these witnesses by introducing evidence of their prior felony convictions. Linda Lykins,

defendant Porter's secretary, testified that she had been listed as a corporate officer of two of defendant Porter's companies. Further, Lykins testified that she could not recall that as a vice-president of one of these companies she had signed blank promissory notes for Sparta Sanders Bank, even though she identified her signature on the blank notes that were introduced as exhibits. Finally, Lykins testified, without objection from defendants, that she had been convicted of "the felony offense of a conspiracy violation [sic] of Federal laws."

Samuel Isaac testified that when he was $400,000.00 in debt and on the verge of having his house sold at a sheriff's sale, he secured a $160,000.00 loan from Sparta Sanders Bank. Further, Issac testified that rather than repaying his creditors, he used the first $22,500.00 of the loan proceeds to purchase stock in Sparta Sanders Bank. Finally, Isaac testified that he purchased the

stock even though he knew the bank was in serious financial trouble and that the notes were not paid when they matured.

The prosecution asked Mr. Isaac whether he had previously been convicted of "mail fraud, embezzlement and--." Defendants objected on the grounds that the question was improper because it inquired into the details of the conviction and that defendants' counsel had not been informed of the conviction prior to trial. The district court overruled the objection, but inquired whether any other witnesses would be called and impeached by prior felony convictions. The prosecution informed the district court that five other such witnesses would be called, and the district court offered to "instruct the jury at the close . . . as a part of my charge to the jury about the impeachment of witnesses."

Defendants requested the court to "admonish the jury of the fact of this witness' conviction upon his testimony if any for the

jury to believe if there is any [sic]. Also, convicted of a felony previously is not in any way to go to the guilt or innocence of the Defendants on trial." The district court instructed the jury that "the fact that this witness or any witness that may hereafter testify that may have previously been convicted of a felony or a crime involving dishonesty or false statement is just a factor that you may consider in weighing the credibility of that witness." Defendants failed to object to the limiting instruction.

Jack Pickett, a real estate appraiser who attributed fifty per cent of his appraisals to defendant Porter, testified that when he incurred cash flow problems, he secured a $15,000.00 loan from Sparta Sanders Bank and that he used the money to purchase stock in the bank. Prior to the prosecution's asking Pickett whether he had previously been convicted of a "felony offense of conspiracy" in

violation of 18 U.S.C. [Sec.] 371, defendants objected "for the same reason that was given yesterday" and on the ground of materiality. Defendants' counsel urged that the question was "totally irrelevant as to whether the credit, it's a question really to the credibility and believeability and impeachment of this witness as to what's relevant to defendants would be [sic]." The district court overruled his objection, and Pickett testified that he had "pled guilty" to the offense.

Elaine Oney, defendant Porter's sister, testified that she had, at the direction of defendant Porter, borrowed money from Sparta Sanders Bank and had deposited it in the account of one of her brother's companies. Further, Oney testified that she had helped launder proceeds from loans made to her brother by defendant Palumbo and that she had signed blank promissory notes for her brother's benefit. Prior to the prosecu-

tion's asking Oney if she had been convicted of conspiracy in violation of 18 U.S.C. [Sec.] 371, a bench conference was held off the record, and no objection was recorded.

Judy Porter, defendant Porter's wife, testified that she was unsure whether she owned stock in the Sparta Sanders Bank and that her role in her husband's various companies was very minimal. Further, Porter testified that she had signed a mortgage which served as collateral for the loan to Elaine Oney. Prior to the prosecution's asking Porter whether she had been convicted of conspiracy in violation of 18 U.S.C. [Sec.] 371, a bench conference was held off the record, and no objection was recorded.

The prosecution called two other witnesses who had pleaded guilty to charges stemming from their involvement in defendants' scheme. Charles Labanz, a former vice-president and major shareholder of Sparta Sanders Bank, testified for the prosecu-

tion concerning his knowledge of defendants' scheme to misapply bank funds. Prior to the prosecution's asking Labanz whether he had pleaded guilty to charges of conspiring to defraud the FDIC and misapplication of bank funds, the district court asked defendants if there were any objections. Defendants responded that "That is a separate indictment. I believe that would have nothing to do with this case. I would object." Defendants also requested that the court admonish the jury that "the fact that these witnesses have been convicted, again, is--goes to their credibility and not to the guilt or innocence of these Defendants." The district court agreed to give the admonition in the final charge, and, as a part of the final charge, the district court instructed the jury that "[t]he fact that a witness has previously been convicted of a felony or a crime involving dishonesty or false statement is also a factor that you may consider in weighing the

credibility of that witness." Defendants made no objection to the district court's charge.

David Taylor, a former vice-president of Sparta Sanders Bank, testified that he was enlisted by defendants to falsely apply for a loan with the proceeds of the loan being returned to defendants Porter and Palumbo. Prior to the prosecution's asking Taylor if he had pleaded guilty to the felony offense of making a false material statement to a bank, defendants objected on the grounds that "the matter hasn't been consummated" and that the government was trying to "discredit, or bolster," rather than impeach the witness. The prosecution responded that the evidence was not offered to impeach the witness, but to make the jury aware of "the circumstances under which he appeared as a witness." The district court overruled defendants' objection.

The prosecution also called Gregory Coyle, a liquidator for the FDIC, who testified abut the loans made to defendants, their companies, and their families and friends. Coyle testified that defendant Palumbo owned the company named Classic Cars, which had obtained $2,000,000.00 in loans from Sparta Sanders Bank before the bank failed in April of 1983. Coyle used a chart to summarize these loans, and the chart indicated the loans that had been made to Classic Cars. The prosecution offered this evidence for the purpose of showing "the motivation of the defendants for the things that they did. Mr. Palumbo wasn't just buying a bank because he was trying to save a sinking ship, as we have heard testimony about."

Prior to admission of the evidence of the Classic Car loans, defendants objected, urging that: "The Classic Cars that the government has designated as Palumbo's, which, number one, we take great issue with. . . .

[T]here has been no testimony from any witness relative to these. These were not Palumbo's." Defendants further explained that: "It was just our position on the Classic Cars; this was in the nature of 404(b) evidence. I thought if the government was going to try to open that up, that there would be live witnesses." The district court overruled the objection and denied defendants' subsequent motion to strike the testimony concerning the Classic Car loans. The district court also denied defendants' request for a limiting instruction, explaining that it preferred not to comment on the evidence.

II.

A. Prior Convictions and Guilty Pleas

Defendants argue that the district court erred by permitting the prosecution to elicit testimony from seven of its witnesses concerning their prior convictions and guilty pleas for the purpose of exposing defendants

to the impermissible inference of guilty by association. Rule 103 of the Federal Rules of Evidence requires that all objections to the admission of evidence must be stated specifically. "[A] specific objection made on the wrong grounds and overruled precludes a party from raising a specific objection on other, tenable grounds on appeal." J. Weinstein & M. Berger, 1 Weinstein's Evidence [Para.] 103[102], at 103-25-103-26 (1986); see also United States v. Mendez-Ortiz, 810 F.2d 76, 78 (6th Cir. 1986), cert. denied, 107 S. Ct. 1387 (1987). Because defendants did not assert in the district court the specific ground for objection they now urge on appeal, we must consider defendants' arguments under the plan error standard of review. See Mendez-Ortiz, 810 F.2d at 78; Helminski v. Ayerst Laboratories, 766 F.2d 208, 211 (6th Cir.), cert. denied, 106 S.Ct. 386 (1985). "[T]he plain error doctrine is to be used sparingly. . . .only in excep-

tional circumstances, ...and solely to avoid a miscarriage of justice. . . . Recourse may be had to the doctrine 'only on appeal from a trial infected with error so "plain" the trial judge and prosecutor were derelict in countenancing it.'" United States v. Hook, 781 F.2d 1166, 1172 (6th Cir.), (quoting United States v. Frady, 456 U.S. 152, 163 (1982) (citations omitted), cert. denied, 107 S.Ct. 269 (1986); see also Mendez-Ortiz, 810 F.2d at 78.

The prosecutor impeached the credibility of Lykins, Isaac, Pickett, Only and Porter by eliciting testimony that they had previously been convicted of felonies. Rule 607 of the Federal Rules of Evidence provides that [t]he credibility of a witness may be attacked by any party, including the party calling the witness." The prosecution's "questioning of its own witnesses concerning prior felony convictions is admissible to enable the jury to weigh the credibility of the witnesses."

United States v. Bileck, 776 F.2d 195, 1987 (7th Cir. 1985). The prosecution "'does not hold out [its] witness[es] as worthy of belief,'" and its "candor" . . . . in eliciting the fact that a witness has a felony conviction is to let the jury know precisely the kind of witness [it] is relying on." Belick, 776 F.2d at 197-98 (quoting Advisory Committee Notes on Rule 607).

"Rule 607 may not, however, be used 'for the purpose of introducting irrelevant evidence or of establishing the defendant's guilt by association with the witness.'" United States v. Townsend, 796 F.2d 158, 162 (6th Cir. 1986) (quoting United States v. Gorny, 732 F.2d 597, 604 (7th Cir. 1984)). The prosecution's conduct must be carefully scrutinized to ensure that a witness is not called merely for the purpose of introducting this sort of improper evidence. Gorny, 732 F.2d at 604. Our review of the record in the present case shows that the testimony of

these five witnesses was extremely important and that the prosecution impeached their credibility because of their hostility and failure to be forthcoming. Thus, the district court's failure to exclude the testimony does not rise to the level of plain error.

The prosecution also elicited the testimony of Taylor and Labanz that they had previously pleaded guilty to felony charges for the purpose of informing the jury of the circumstances under which they appeared as witnesses. While the guilty plea of a compatriot may not be considered as substantive evidence of the defendant's guilt, the guilty plea "may properly be considered as evidence of a witness' credibility. . . . '[U]nder proper instruction, evidence of a guilty plea may be elicited by the prosecutor on direct examination so that the jury may assess the credibility of the witnesses the government asks them to believe.'" United States v.

Christian, 786 F.2d 203, 214 (6th Cir. 1986) (quoting United States v. Halbert, 640 F.2d 1000, 1004 (9th Cir. 1981)) (citation omitted); see also Townsend, 796 F.2d at 162. The district court in the present case instructed the jury that "the fact that an accomplice has entered a guilty plea to the offense charged is not evidence, in and of itself, of guilt or innocence--of the guilt of any other person." Thus, the district court's failure to exclude the testimony does not rise to the level of plain error.

Defendants further argue that the district court erred by failing to instruct the jury that the testimony of the witnesses concerning their prior convictions should not be considered in assessing the guilt or innocence of defendants. While defendants twice asked the district court to instruct the jury that a prior conviction is a factor to be considered in assessing witness credibility and that a witness' prior conviction should

not be considered in assessing the guilt or innocence of defendants, defendants made no objection when the district court twice gave only the inital portion of the requested instruction. Defendants' requests alone were not sufficient to preserve their objection to the limiting instruction. "If counsel requests a limiting instruction, but is dissatisfied with the one given, he must then made an objection to the instruction that is timely and specific." 21 C. Wright & K. Graham, Federal Practice and Procedure [Sec.] 5065, at 325 (1977); see also United States v. Dozier, 672 F.2d 531, 543 (5th Cir.), cert. denied, 459 U.S. 943 (1982). Defendants made no timely and specific objections, and we do not consider the district court's failure to give the requested instruction in its entirety plain error. The evidence of defendants' guilt was overwhelming, and the instruction given by the district court was

sufficient to minimize any possible unfair prejudice to defendants.

B. Classic Car Loans

Defendants argue that the district court erred by permitting the prosecution to introduce evidence concerning the "Classic Car loans," which, according to defendants, was a "blatant attempt by the prosecution to show other crime evidence in order to establish bad character and propensity to commit crimes." Rule 103 of the Federal Rules of Evidence requires that an objection be "timely" if it is to be preserved for appellate review. "[T]he appropriate time for raising an objection is as soon as the ground for objection is known, or could reasonably have been known to the objector--unless some special reason makes its postponement desirable and not unfair to the opposition." United States v. Gibbs, 739 F.2d 838, 849 (3rd Cir. 1984) (en banc), cert. denied, 469

U.S. 1106 (1985); see also 21 C. Wright & K. Graham, supra, [Sec.] 5037, at 188. Rule 404(b) is a rule of inclusion and not exclusion, and defendants' oblique comment that the evidence was "in the nature of 404(b) evidence," when considered in context, was not sufficient to alert the district court that defendants considered the evidence inadmissible evidence of character. Moreover, defendants' subsequent motion to strike on the basis of Rule 404(b) was untimely because the basis of defendants' objection was apparent prior to introduction of the evidence. Thus, we must consider defendants' argument under the plan error standard of review.

Defendants did, however, make a timely request that the jury be instructed with respect to the limited purpose for which the evidence of the Classic Car loans was admitted. Rule 105 of the Federal Rules of Evidence provides that "[w]hen evidence which is admissible as to one party or for one

purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." (emphasis added). While the district court's policy of not commenting on the evidence was obviously not a sufficient basis to deny the instruction, the refusal to give the instruction was harmless. The district court later instructed the jury that "defendants are not on trial for any act not charged in the indictment," and the evidence of defendants' guilt was overwhelming.

III.

Accordingly, the judgment of the district court is AFFIRMED.

1/ Defendant Porter also argues in his supplemental pro se brief that his double jeopardy rights were violated, that he was deprived of effective assistance of counsel, that the district court should have ordered a severance, and that the prosecution failed to disclose exculpatory evidence. Having reviewed the record, we find these arguments are without merit and warrant no discussion.

APPENDIX "B"

NOS. 86-5745/5746

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
ROBERT T. PORTER (86-5745)	)
JEROME J. PALUMBO (86-5746),	)
	)
Defendant-Appellant.	)

ORDER

Before: KENNEDY, MILBURN and NORRIS, Circuit Judges

Upon consideration of the petition for rehearing filed herein by the defendants-appellants, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

_____

Leonard Green, Chief Deputy

APPENDIX "C"

(Excerpt of trial transcript)

Testimony of Witness, LINDA LYKINS, p. 2-15:

> Q. Ms. Lykins, are you the same Linda Lykins who was convicted in the Southern District of Ohio on January 21, 1986 for the felony offense of a conspiracy violation of federal laws?

Testimony of SAMUEL T. ISAAC, p. 4-79:

> Q. Mr. Isaac, are you the same Samuel T. Isaac that was convicted in the United States District Court for the Northern District of Illinois in 1983 on charges of mail fraud, charges of embezzlement and a charge of false statement?

Testimony of JACK PICKETT, p. 30:

> Q. Mr. Pickett, I wanted to ask you, sir, are you the same Jack T. Pickett convicted in the Southern District of Ohio, Western Division of Cincinnati, on January 21, 1986, for a federal felony offense

of conspiracy in violation of Title 18, Section 3013, for which you received, excuse me, Title 18, Section 371 U.S.C. for which you received a sentence of five (5) years?

Testimony of ELAINE ONEY, p. 5-129:

Q. Mrs. Porter, are you the same Judith L. Porter who was convicted on January 21, 1986, in the United States District Court, Southern District of Ohio, on the charge of conspiracy and violation of Title 18, Section 371, U.S.C., for which you received a sentence of our (4) years?

Testimony of DAVID TAYLOR, pp. 6-36, 37:

Q. Mr. Taylor, I want to ask you, sir, are you the same David A. Taylor for whom a judgment of conviction has been entered to Count 8 of the indictment here, United States District Court for Eastern District of Kentucky at Ashland, for the felony offense of making a false, material statement to the Sparta-Sanders Bank?

Testimony of CHARLES NICHOLAS LABANZ, p. 6-120:

Q. Mr. Labanz, are you the same C. Nicholas Labanz who was convicted in the U. S. District Court for the Eastern District of Kentucky in November, 1985 on a charge of conspiracy to defraud the FDIC and a charge of misapplication of bank funds?

Supreme Court, U.S.
FILED
FEB 25 1988
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CLERK

No. 87-1079

In the Supreme Court of the United States

OCTOBER TERM, 1987

JEROME J. PALUMBO AND
ROBERT T. PORTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed plain error by allowing government witnesses to testify that they had been convicted of crimes similar to the ones for which petitioners were on trial.

2. Whether evidence of petitioner Palumbo's financial dealings with a bank was properly admitted at trial.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The unpublished opinion of the court of appeals (Pet. App. 1-22) is noted at 829 F.2d 39 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1987. A petition for rehearing was denied on October 29, 1987. The petition for a writ of certiorari was filed on December 29, 1987, and is therefore one day out of time under this Court's Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner Porter was

convicted of conspiring to defraud the Federal Deposit Insurance Corporation (FDIC), in violation of 18 U.S.C. 371; six counts of making false entries in bank books, in violation of 18 U.S.C. 1005; one count of making false statements in connection with securing a bank loan, in violation of 18 U.S.C. 1014; and eight counts of misapplying bank funds, in violation of 18 U.S.C. 656. Petitioner Porter was sentenced to a total of five years' imprisonment and an $80,000 fine. Petitioner Palumbo was convicted on one count of conspiring to defraud the FDIC, in violation of 18 U.S.C. 371; four counts of making false entries in bank books, in violation of 18 U.S.C. 1005; three counts of making false statements in connection with securing a bank loan, in violation of 18 U.S.C. 1014; and four counts of misapplying bank funds, in violation of 18 U.S.C. 656. Petitioner Palumbo was sentenced to a total of 12 years' imprisonment and a fine of $65,000. The court of appeals affirmed (Pet. App. 1-22).

1. Petitioner Porter was a vice-president and the major shareholder of the Sparta Sanders State Bank in Gallatin County, Kentucky. In 1981, the FDIC issued a cease and desist order against the bank because of its unsound financial condition and ordered it to increase its capital by approximately $315,000 before May 9, 1982, or suffer cancellation of its insurance. In order to comply with the FDIC's directives, Porter devised a scheme to lend the bank's money to his relatives and friends (including petitioner Palumbo), who would then return the money to the bank. Porter required little or no collateral for those loans. Porter then represented to the FDIC that the returned money was a new infusion of capital. As a result of the scheme, Palumbo became a major shareholder in the bank and placed an associate as president of the bank. Pet. App. 3-4.

2. During trial, the government presented the testimony of 14 witnesses who had assisted petitioners in making the fraudulent loans or in laundering the money that was returned to the bank as "capital." Many of those witnesses were hostile to the government. The prosecutor secured admissions from seven of the witnesses that each had previously been convicted of a felony. Linda Lykins, petitioner Porter's former secretary, testified that she had previously been convicted for "the felony offense of a conspiracy violation of Federal laws" (Pet. App. 5). Petitioners did not object to her testimony (*ibid.*; C.A. App. 113-114).

Samuel Isaac, a purchaser of stock in the bank, admitted that he had been convicted in 1983 for the offenses of mail fraud, embezzlement, and false statement (C.A. App. 147, 154). Petitioners objected to that testimony on the grounds that the prosecutor had no right to inquire into the details of the witness's convictions and that the prosecutor had failed to provide that information to the defense (*id.* at 147, 148-149, 151). The court overruled the objections (*id.* at 152, 154). Palumbo asked the court to instruct the jury "of the [effect] of this witness' conviction upon his testimony if any for the jury to believe if there is any" and that the witness's conviction "is not in any way to go to the guilt or innocence of the Defendants on trial" (*id.* at 153). The court instructed the jury that it could consider a witness's conviction in determining the weight to be given his testimony, but it did not include the portion of the requested instruction directing the jury not to consider the conviction against petitioners (*id.* at 154-155). Petitioners did not object to the court's limiting instruction as to the omission of the second part of the instruction they had requested (*id.* at 155; Pet. App. 7).

Jack Pickett, another purchaser of bank stock, testified that he had pleaded guilty to a federal charge of con-

spiracy and that he had been sentenced to five years' imprisonment for that offense (C.A. App. 163, 165-166). Petitioners objected "for the same reason that was given yesterday" and because the prosecutor's inquiry was not "material" (*id.* at 163). The court overruled the objection and permitted the testimony (*id.* at 166; Pet. App. 7-8).

Elaine Oney, petitioner Porter's sister, admitted that she had been convicted of conspiracy in 1986 and sentenced to four years' imprisonment. A bench conference was held off the record, but no objection to the prosecutor's inquiry was recorded (Pet. App. 8-9; C.A. App. 203-204).

Judith Porter, petitioner Porter's wife, testified that she had been convicted of conspiracy in 1986 and had been sentenced to four years' imprisonment. A bench conference was held off the record, but once again no objection was recorded (Pet. App. 9; C.A. App. 236).

David Taylor, a former vice-president of the bank, admitted that he had pleaded guilty to the offense of making a false statement to the Sparta Sanders State Bank (C.A. App. 248-249). Petitioners objected to that testimony on the ground that the government was attempting to "discredit" or "bolster" Taylor, rather than to impeach him (*id.* at 247). The trial court overruled the objection and admitted the testimony (*ibid.*; Pet. App. 11).

Charles Labanz, a former bank official, admitted that in 1985 he had pleaded guilty to charges of conspiracy to defraud the FDIC and misapplication of bank funds (C.A. App. 261-262). Petitioners objected on the ground that "that is a separate indictment" that "would have nothing to do with this case" (*id.* at 256). The court overruled the objection but agreed to give petitioners' requested limiting instruction that a witness's conviction could be used only to assess the witness's credibility and not as evidence of petitioner's guilt (*ibid.*; Pet. App. 9-11).

During its final jury charge, the district court instructed the jury that an accomplice's plea of guilty is not evidence of the guilt of any other person (C.A. App. 298). The court also told the jury that it could consider a witness's conviction of a felony or a crime involving dishonesty or false statement to assess the credibility of that witness (*id.* at 297-299). Petitioners did not object to those instructions (*id.* at 301).

3. The indictment alleged in part that the objective of the conspiracy was to procure loans fraudulently from the Sparta Sanders State Bank and to use the proceeds for their personal use and benefit, including the payment of their debts and obligations (C.A. App. 24-25). At trial, the government offered evidence that Palumbo's business, Classic Cars, owed the bank more than $2.4 million at the time the bank failed (*id.* at 310). The prosecutor explained to the court that that evidence was offered for the limited purpose of showing that Palumbo was motivated to purchase bank shares in order to continue borrowing large sums from the bank (*id.* at 267-271). The prosecutor also stated that her witness, an FDIC official, would testify about "what was due" and "what [was] owed" based on his examination of the bank's records and other pertinent files and documents (*id.* at 270; see *id.* at 267-272). Palumbo objected to that evidence on the ground that it was "in the nature of [Rule] 404(b) evidence" (C.A. App. 273). He contended that Classic Cars was not his business and that civil litigation on that issue was currently pending in state court (*id.* at 268-269, 273). The court overruled the objection and admitted the evidence (*id.* at 273-274; Pet. App. 12-13).

Gregory Coyle, an FDIC bank liquidation specialist, testified that after examining the documents showing the bank's outstanding loans, he had concluded that Classic Cars, which was Palumbo's business, owed the bank more

than $2,414,000 when the bank failed in April 1983 and $2,412,000 when the indictment in this case was filed (C.A. App. 274-277). A chart summarizing the conspirators' outstanding loans from the bank (including Classic Cars' loans) was also admitted into evidence (*id.* at 280, 310). After Coyle testified, petitioner Palumbo moved to strike his testimony because it was "in the nature of [Rule] 404(b) evidence" (C.A. App. 278-279). In the alternative, petitioner Palumbo requested a limiting instruction to the jury. The court denied Palumbo's motions on the ground that it preferred not to comment on the evidence (*id.* at 278-280).

4. The court of appeals affirmed (Pet. App. 1-22). It rejected petitioners' contention that the district court erred by permitting the prosecutor to elicit evidence that its witnesses had been convicted of, or had pleaded guilty to, crimes similar to the ones for which petitioners were on trial (*id.* at 13-20). The court held that the issue could be reviewed only for plain error because petitioners did not object at trial on the ground that the witnesses' convictions were being used as substantive proof of petitioners' guilt (*id.* at 14). The court also concluded that the evidence was admissible to impeach the witnesses' credibility, because of their hostility and refusal to be forthcoming in their testimony (*id.* at 16-17). Furthermore, the court held that the district court's limiting instruction did not constitute plain error, because the proof of petitioners' guilt was overwhelming (*id.* at 19-20).

The court also rejected petitioner Palumbo's claim that the district court erred by admitting evidence that Classic Cars had more than $2.4 million in outstanding loans at the time the bank failed (Pet. App. 20-22). The court found that Palumbo had not preserved his claim that the Classic Cars evidence was inadmissible because it constituted improper character evidence (*id.* at 20-21).

Moreover, because the evidence of Palumbo's guilt was "overwhelming," the court concluded that the trial court's failure to give a limiting instruction with regard to the Classic Cars evidence was harmless error (*id.* at 22).

ARGUMENT

1. Petitioners contend (Pet. 8-12) that the district court erred by admitting evidence that the government's witnesses had been convicted of crimes similar to the offenses for which petitioners were then on trial. That fact-bound question warrants no further review.

In the first place, petitioners' contention can be reviewed only for plain error, since they did not object to the admission of that evidence at trial on the grounds that they assert in their petition. At trial, petitioners argued that the evidence was inadmissible because it was too detailed, because it was irrelevant, because it concerned a separate indictment, and because it was not disclosed to petitioners before trial. Petitioners did not object on the ground that the prosecutor was trying to use the evidence as substantive proof of their guilt. Thus, the court of appeals correctly concluded (Pet. App. 13-16) that petitioners' objections at trial were insufficient to preserve the claim. See Fed. R. Evid. 103(a)(1); *United States* v. *Johnson*, 802 F.2d 1459, 1465, 1466-1467 (D.C. Cir. 1986); *United States* v. *Taylor*, 800 F.2d 1012, 1017 (10th Cir. 1986), cert. denied, No. 86-7014 (Oct. 5, 1987). To prevail under the plain error standard, petitioners must show that the admission of the evidence resulted in a miscarriage of justice. *United States* v. *Johnson*, 802 F.2d at 1465; see generally *United States* v. *Young*, 470 U.S. 1, 15-16 (1985); *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982). They have not done so in this case.

An accomplice's conviction of an offense arising from the crime for which a defendant is on trial is inadmissible as substantive proof of the defendant's guilt. Nonetheless, it is well settled that the government can elicit evidence of an accomplice's conviction during direct examination for other reasons: for example, (1) to allow the jury to consider the effect of that conviction on the witness's credibility; (2) to forestall the defense argument that the government is concealing the witness's bias or is unfairly singling out the accused; or (3) to establish the witness's first-hand knowledge of the crime by showing his participation in the offense. See, *e.g.*, *United States* v. *Louis*, 814 F.2d 852, 855-856 (2d Cir. 1987); *United States* v. *McGrath*, 811 F.2d 1022, 1024-1025 (7th Cir. 1987); *United States* v. *Davis*, 766 F.2d 1452, 1456-1457 (10th Cir.), cert. denied, 474 U.S. 908 (1985); *United States* v. *Melton*, 739 F.2d 576, 578-579 (11th Cir. 1984); *United States* v. *Roth*, 736 F.2d 1222, 1226-1227 (8th Cir.), cert. denied, 469 U.S. 1058 (1984); *United States* v. *Renton*, 700 F.2d 154, 160 (5th Cir. 1983).

As the court of appeals noted (Pet. App. 17), the government's witnesses, who were petitioners' former accomplices, were hostile to the government and were not forthcoming in their testimony. Accordingly, it was entirely proper for the government to elicit their convictions for impeachment purposes. Furthermore, petitioners were not unduly prejudiced by the evidence, because the prosecutor's questions were brief and did not suggest that the accomplices' convictions constituted evidence of petitioners' guilt. Indeed, in six of the seven instances in which the witnesses' convictions were elicited as evidence, the prosecutor identified the witness's crime in the abstract and did not suggest that it was related to the one for which petitioners were on trial. Moreover, the district court minimized any prejudice to petitioners by instructing

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the jury during its final charge that evidence of an accomplice's guilty plea was not evidence of the guilt or innocence of any other person, and that the jury could consider evidence of a witness's conviction in assessing that witness's credibility. Finally, the court of appeals found that the proof of petitioner's guilt was "overwhelming" (Pet. App. 19). Petitioners therefore were not prejudiced by the admission of this evidence.[1]

Petitioners err in contending (Pet. 10-11) that the decision below conflicts with *United States* v. *Fleetwood*, 528 F.2d 528 (5th Cir. 1976). The difference between the result in *Fleetwood* and the result in this case is due to a difference in the facts, not a disagreement on principle. In *Fleetwood*, the court acknowledged that a prosecutor may elicit evidence of an accomplice's prior conviction in order

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[1] Petitioners also criticize (Pet. 11-12) the limiting instruction given by the district court during trial that a witness's conviction could be considered in assessing his credibility. Petitioners argue that the instruction was insufficient because it did not also state that the jury should not consider a witness's conviction as evidence of petitioners' guilt. That claim lacks merit, for two reasons.

First, petitioners have not preserved that issue for review because, although they requested such an instruction, they did not object to the sufficiency of the limiting instruction that the trial court gave after it was given. 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5065, at 325 (1977); see *Greer* v. *Miller*, No. 85-2064 (June 26, 1987), slip op. 9-10 & n.8 (a defendant bears the "primary responsibility" for ensuring that a curative instruction is sufficiently specific). Second, the instruction given by the district court during trial must be viewed together with the instruction that the court gave during its final jury charge. When read together, the court's instructions were sufficient. See *United States* v. *McGrath*, 811 F.2d at 1024-1025 (instruction to consider accomplice's conviction solely on issue of accomplice's credibility was sufficient despite the omission from the charge that the accomplice's conviction should not be considered as proof of the defendant's guilt).

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to impeach his credibility (*id.* at 532, 533), but it held that, under the particular facts of that case, the prosecutor's "repeated, methodical, and essentially unnecessary questioning" (*id.* at 535) of several government witnesses concerning their guilty pleas to offenses similar to the crime for which the defendant was on trial resulted in the use of the convictions as substantive evidence of the defendant's guilt. Since *Fleetwood*, the Fifth Circuit has recognized that the decision in that case requires a reviewing court to consider seven different factors in evaluating a claim of error, such as whether the defendant objected at trial, whether the prosecutor sought to use an accomplice's convictions as substantive proof of the defendant's guilt, whether the trial judge gave a limiting instruction, and whether the proof of the defendant's guilt was strong or weak. *United States* v. *Renton*, 700 F.2d at 160; *United States* v. *Borchardt*, 698 F.2d 697, 701 (5th Cir. 1983), cert. denied, 469 U.S. 937 (1984); *United States* v. *Black*, 685 F.2d 132, 135 (5th Cir.), cert. denied, 459 U.S. 1021 (1982). In this case, the prosecutor's questioning of the witnesses was brief and unremarkable. She did not aggressively and repeatedly question the witnesses about their convictions, and she did not imply that the evidence could be considered as proof of petitioners' guilt. The trial judge instructed the jury that evidence of the witnesses' convictions should be considered only with regard to their credibility. And the proof of petitioners' guilt was overwhelming. Accordingly, the decision in this case is not inconsistent with the Fifth Circuit's decision in *Fleetwood*.

2. Petitioner Palumbo contends (Pet. 13-19) that the evidence of Classic Cars' outstanding loans from the Sparta Sanders State Bank was improperly admitted under Fed. R. Evid. 404(b) as similar act evidence. That contention lacks merit.

Rule 404(b) states that evidence of similar acts committed by the defendant is not admissible to prove that he is a person of bad character, but may be admissible to show, among other things, his motive, plan, or intent. In this case, the evidence that Classic Cars owed the bank more than $2.4 million was not "similar act" evidence at all, because it did not involve any collateral act of misconduct on Palumbo's part. The indictment alleged that Palumbo and his co-conspirators obtained a financial interest in the bank in order to use the bank's assets for their personal benefit. Proof that Classic Cars owed the bank more than $2.4 million at the time the bank failed did not constitute evidence that petitioner Palumbo had committed a different crime. Rather, that evidence simply showed that Palumbo's motive in acquiring a financial interest in the bank was to further his own business. Because that proof did not involve any "similar act," it was not subject to Rule 404(b). See *United States* v. *Wood*, 834 F.2d 1382, 1386-1387 (8th Cir. 1987) (evidence of defendant's large cash purchases showed that he was a participant in conspiracy; evidence not subject to Rule 404(b)); *United States* v. *Bernal*, 719 F.2d 1475, 1478-1479 (9th Cir. 1983) (evidence of large amount of cash and narcotics distribution paraphernalia showed that defendant participated in drug conspiracy; not Rule 404(b) evidence). Furthermore, the FDIC official's testimony was based upon his examination of the pertinent bank records. Accordingly, contrary to petitioners' claim (Pet. 13), there was a substantial basis for admitting the evidence. Finally, even if that evidence was improperly admitted, the error was harmless because, as both the district court (C.A. App. 308) and the court of appeals (Pet. App. 22) noted,

the proof of Palumbo's guilt was "overwhelming." See *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] There is no reason to hold this case pending the Court's decision in *Huddleston* v. *United States*, cert. granted, No. 87-6 (Oct. 13, 1987). The question in *Huddleston* is whether the government must prove by clear and convincing evidence that the defendant has committed a similar act before evidence of that act may be admitted under Fed. R. Evid. 404(b). In this case, the Classic Cars loan evidence related directly to the conspiracy charge in the indictment and was not similar act evidence subject to Rule 404(b). The government therefore would not have had to prove its existence by clear and convincing evidence, even under the test for which the petitioner in *Huddleston* is contending. In addition, the court of appeals found that any error in the admission of this evidence was harmless. Thus, regardless of how this Court resolves *Huddleston*, the decision in that case will not affect the disposition of this case.

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